

IN RE EASTSIDE SALVAGE TIMBER SALE

IBLA 94-36

Decided December 20, 1993

Appeal from a decision of the Klamath Falls Resource Area Manager, Bureau of Land Management, denying a protest and request for a stay of the Eastside Salvage Timber Sale. OR 014-93-5.

Request for a stay denied; decision affirmed.

1. Rules of Practice: Appeals: Stay--Timber Sales and Disposals

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of forest management decisions, including timber sale decisions, 43 CFR Part 5000, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f).

2. Contests and Protests: Generally--Rules of Practice: Appeals: Statement of Reasons--Timber Sales and Disposals

A decision by BLM denying a protest of a timber sale may be affirmed where the statement of reasons filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and fully addresses each of the arguments contained in the protest.

APPEARANCES: Mark M. Hubbard, Eugene, Oregon, for appellant.

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Oregon Natural Resources Council (ONRC) has appealed a September 23, 1993, decision of the Klamath Falls Resource Area Manager, Bureau of Land Management (BLM), denying its protest and request for a stay of the Eastside Salvage Timber Sale (OR 014-93-5), and determining, in accordance with 43 CFR 5003.3(f), to proceed with implementation of the timber sale. In his decision, the Area Manager also informed ONRC that "[a]ccording to 43 CFR, Part 4, you have the right to petition the Office of Hearings and Appeals to stay the implementation of the decision" (Decision at 14).

ONRC filed a timely notice of appeal in which it requested a stay of all further action on the timber sale.

[1] Although the Area Manager did not cite a particular regulation in 43 CFR Part 4, 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)) controls the effect of decisions pending appeal, "[e]xcept as otherwise provided by law or other pertinent regulation," and provides at (a)(2) that a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal. The regulations governing the administration of forest management decisions, including timber sale decisions, 43 CFR Part 5000, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a).

Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f). In this case, the authorized officer determined, upon denial of ONRC's protest, to proceed with the timber sale. 43 CFR 4.21(a) does not apply in this case and the provisions thereof relating to the filing of petitions for a stay are inapplicable. Cf. Michael Blake, 127 IBLA 109, 110 (1993) (43 CFR 4.21(a) does not apply to decisions to remove wild horses or burros from public lands because 43 CFR 4770.3(c) contains a specific provision governing the effect of such decisions). <sup>1/</sup> However, nothing in the regulations in 43 CFR Part 4 precludes the filing of a petition or request for a stay at any time during a proceeding before the Board, and the Board, in its discretion, may entertain such a petition or request. Robert E. Oriskovich, 128 IBLA 69 (1993).

Although 43 CFR 4.21 is not applicable in this case, the standards set out in 43 CFR 4.21(b) for judging a petition for a stay are essentially those that have long been recognized and applied by this Board in determining whether to grant a stay. See Jan Wroncy, 124 IBLA 150, 152 (1992);

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<sup>1/</sup> In Blake v. Babbitt, No. 93-0726(RCL) (Nov. 18, 1993), the United States District Court for the District of Columbia dismissed a challenge to the validity of 43 CFR 4770.3. Therein, it found at page 6, note 1, that 43 CFR 4770.3 is a "pertinent regulation" falling within the exception provided in 43 CFR 4.21(a)

High Desert Communications, Inc., 123 IBLA 20, 23-24 (1992); In Re Bar First Go Round Salvage Sale, 121 IBLA 347, 348 (1991); Marathon Oil Co., 90 IBLA 236, 245-46, 93 I.D. 6, 11-12 (1986). 2/ The party requesting the stay bears the burden of proof to demonstrate that a stay should be granted.

In support of its request for a stay, ONRC merely makes generic assertions that irreversible environmental damage will result if no stay is granted and that failure to grant a stay may expose the Government to liability and the purchaser to financial loss. 3/ ONRC makes no attempt to tie its arguments in the request to this particular timber sale. However, appellant has filed a statement of reasons (SOR) for appeal in which it raises arguments directed specifically to this sale. Those arguments, however, are, in essence, a restatement of most of the 16 individual contentions contained in its protest. In fact, of the 11 arguments presented in the SOR, four are verbatim repetitions of arguments in the appeal. 4/ Three other arguments in the SOR are exactly the same as arguments in the protest with only the addition of one or two sentences. 5/ Of the remaining four arguments in the SOR, all contain the same language as the protest with the addition of a single new paragraph in each. 6/

[2] In In re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991), the Board stated that it had held on numerous occasions that an appellant is required to point out affirmatively why the decision under appeal is in error. We directed attention to Shell Offshore, Inc., 116 IBLA 246, 250 (1990), where we held that this requirement is not satisfied if the appellant "has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision \* \* \* addressing those points." Essentially, that is what ONRC has done in this case. Review of the additional language included on appeal reveals that it fails to raise any new issues for consideration or point out any specific error in BLM's decision.

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2/ The standards, as set forth in Wroncy, 124 IBLA at 152, are likelihood of success on the merits, threat of irreparable injury to the moving party if the stay is not granted, whether the threatened injury to the moving party outweighs the potential harm the stay may cause to the nonmoving party, and whether the stay is contrary to the public interest.

3/ The fact that irreparable environmental harm may result if a particular timber sale were to go forward does not establish that such harm would ensue in all cases, and appellant has not shown how proceeding with this particular sale would cause irreparable harm.

4/ Those are arguments numbered 3, 9, 10, and 11 in the SOR, which correspond to arguments numbered 3, 9, 11, and 12, respectively, in the protest.

5/ Argument 1 of the appeal is verbatim argument 1 in the protest, except for two introductory sentences. Arguments 7 and 8 of the appeal correspond to arguments 7 and 8 of the protest with the addition of one and two sentences, respectively.

6/ These four arguments are identically numbered in the protest and SOR as 2, 4, 5, and 6.

While ONRC complains that because another timber sale, the Norcross Barnes sale, is within the same "river basin" as the sale in question, BLM should consider the cumulative impacts of the two sales, including the effect on the endangered short-nosed sucker (Appeal Arguments 2 and 3), ONRC does not submit any evidence in support of that claim. BLM stated in its decision that it had determined that the Eastside Salvage Timber Sale would not have any effect on any threatened or endangered species, including the short-nosed sucker (Decision at 2). In addition, BLM specifically found that

[n]one of the trees designated for harvest will affect the Barnes Valley Creek drainage itself. Nor will they affect the allotments adjacent to Barnes Valley Creek. The 312 trees are marked in 59 different locations which amounts to removing on the average of 5-6 trees per site. With so few trees per site designated for removal in the Eastside Salvage Timber Sale, cumulative impacts from both the Eastside Salvage Timber Sale and Norcross Barnes Timber Sale were determined to be insignificant.

(Decision at 4).

ONRC complains that although BLM concluded in its decision that "grazing trespass is minimal, this is not documented in the EA [Environmental Assessment] for this sale" (Appeal Argument 4). This contention was made in connection with ONRC's repetition of its argument that BLM should analyze the cumulative impacts of the present sale with the Norcross Barnes timber sale and with grazing in certain allotments and that grazing trespass had been occurring in the Barnes Valley Creek area. ONRC ignores BLM's detailed response to the claim of grazing trespass, which BLM provided despite its conclusion that "the trespass cattle you mentioned in your protest are not applicable to the Eastside Salvage Timber Sale or EA" (Decision at 4). ONRC has failed to show the necessity for documentation of the grazing trespass in the EA.

ONRC also asserts in Appeal Argument 6 that BLM has not adequately analyzed forest health problems and it repeats its argument that "[t]his sale is actually continuing and exacerbating the forest health problems by continuing to cut large healthy pines." Again, ONRC has ignored BLM's decision which specifically stated that of the 312 trees marked for cutting in the sale, 302 were completely dead, 8 had dead tops, 1 had less than 15 percent crown left, and only 1 was a live green tree. BLM also pointed out that it has been selectively harvesting ponderosa pine in the resource area for 40 years and that as a result of its policy of selectively removing poor vigor and suppressed trees in all age classes, it has maintained healthy forest conditions. ONRC has provided nothing on appeal to dispute BLM's position.

We have reviewed the record in this case, including the EA, ONRC's protest, BLM's decision, and ONRC's SOR, and we agree with BLM's disposition of the issues raised by ONRC.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the request for a stay is denied and the decision appealed from is affirmed.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge